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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

RUFINA MOLINA, ESTATE OF LUIS  
MARTINEZ, by and through successor in  
interest, RUFINA MOLINA,  
Plaintiffs,  
v.

CITY OF LOS ANGELES; RICARDO  
HUERTA, RUDOLPH RIVERA, ALDO  
QUINTERO, and DOES 1 through 10,  
inclusive,  
Defendants.

**CASE NO. CV16-1293 ODW(ASx)**  
Hon. Otis D. Wright

**DEFENDANTS' JOINT MOTION  
FOR SUMMARY JUDGMENT  
OR, IN THE ALTERNATIVE,  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

[Filed Concurrently with Statement  
of Uncontroverted Facts; Appendix  
of Exhibits; Declarations; and  
[Proposed] Order]

Date: February 13, 2017  
Time: 1:30 p.m.  
Courtroom: 5D

Action Filed: April 22, 2015  
Trial Date: April 4, 2017

TO THE HONORABLE COURT AND ALL PARTIES HEREIN:

PLEASE TAKE NOTICE that at 1:30 p.m. on Monday, February 13, 2017 or as soon thereafter as the matter may be heard in Courtroom 5D, before the Honorable Otis D. Wright, United States District Court Judge, located at 350 W. 1st Street, 5th Floor, Los Angeles, CA 90012, defendants City of Los Angeles, Ricardo Huerta, Rudolph Rivera, and Aldo Quintero (hereinafter referred to as “City,” “Huerta,” “Rivera,” and “Quintero” respectively and as “defendants” collectively) will and hereby do move this Court, pursuant to Rule 56 of the *Federal Rules of Civil Procedure*, for summary judgment or, in the alternative, partial summary judgment against plaintiffs on the grounds that there are no genuine issues of material fact with regard to the following issues raised in the First Amended Complaint (“FAC”):

1. Plaintiffs’ first cause of action for excessive force/unreasonable seizure fails as a matter of law;
2. Plaintiffs’ second cause of action for interference with familial integrity as a substantive due process violation fails as a matter of law; and
3. Plaintiffs’ third cause of action for municipal liability for unconstitutional customs and practices fails as a matter of law.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities attached hereto, the declarations of Matthew W. McAleer, Ricardo Huerta, Rudolph Rivera and Aldo Quintero, all

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1 papers, pleadings, and records on file herein, the Statement of Uncontroverted  
 2 Facts, and Appendix of Exhibits filed concurrently herewith and on such other  
 3 matters as may properly come before the Court before or at the hearing.  
 4

### 5 MEET AND CONFER

6 Pursuant to local rule 7-3, defense counsel attempted to meet and confer  
 7 with counsel for plaintiffs on numerous occasions regarding the issues raised in the  
 8 instant motion. However, plaintiffs' counsel did not meet and confer with defense  
 9 counsel at any of the agreed-upon times thereby refusing to dismiss any portion of  
 10 the FAC thus necessitating the instant motion. (Decl. McAleer ¶¶3-8)  
 11

12 DATED: January 13, 2017

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 14 A Professional Corporation

15 By: \_\_\_\_\_/s/\_\_\_\_\_  
 16 Laura E. Inlow, Esq.  
 17 Matthew W. McAleer, Esq.  
 18 Attorneys for Defendants,  
 19 Ricardo Huerta, Rudolph Rivera, and  
 20 Aldo Quintero

21 DATED: January 13, 2017

22 **MICHAEL N. FEUER**, City Attorney  
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 24 Attorney  
 25 **CORY M. BRENT**, Assistant City Attorney

26 By: \_\_\_\_\_/s/\_\_\_\_\_  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. STATEMENT OF FACTS**

3 Plaintiffs Rufina Molina (hereinafter “Molina”) and the Estate of Luis  
4 Martinez, by and through its successor in interest, Rufina Molina, filed the  
5 operative First Amended Complaint (FAC) on April 21, 2016 arising out of the  
6 death of Molina’s son, Luis Martinez (hereinafter “Martinez”), on April 21, 2015.  
7 The FAC alleges three causes of action as follows: 1) excessive force/improper  
8 seizure of the decedent under the Fourth Amendment, 2) interference with familial  
9 integrity under the Fourteenth Amendment, and 3) a *Monell* claim against the City  
10 of Los Angeles under 42 U.S.C. §1983. (UMF 1)  
11

12 On Tuesday, April 21, 2015, at approximately 4:25 p.m., Monica Ramirez  
13 telephoned 911 to report that her husband, Luis Martinez, had stabbed himself with  
14 a knife but was no longer armed. Ms. Ramirez reported to the 911 operator that  
15 Martinez was depressed and in need of emergency medical treatment at their  
16 apartment located in Los Angeles. (UMF 2) According to Ms. Ramirez, she had  
17 entered their bedroom and observed Martinez sitting in a wheelchair with the front  
18 of his shirt covered in blood and a kitchen knife lying across his lap. When  
19 Martinez would not speak, Ms. Ramirez concluded that he had stabbed himself and  
20 she tried unsuccessfully to convince him to go to an emergency room with her.  
21 After taking the knife away from Martinez, she called 911 to request an  
22 ambulance. (UMF 3) Martinez had been using a wheelchair during his  
23 convalescence after fracturing his pelvis when he jumped or fell off the third floor  
24 of his apartment building while high on methamphetamines on January 21, 2015.  
25 (UMF 4)  
26  
27  
28

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1 The LAPD Communications Division broadcast a radio call for an attempted  
 2 suicide at the residence of Ms. Ramirez and Martinez. The call was assigned to  
 3 LAPD Officer Aaron Skiver and his partner defendant Huerta. (UMF 5) Officer  
 4 Huerta shared the comments related to the incident, that Martinez was suffering  
 5 from depression, had stabbed himself but was no longer armed, with Officer  
 6 Skiver. (UMF 6) At approximately 4:34 p.m., Officers Skiver and Huerta parked  
 7 their vehicle in front of Martinez's apartment complex. (UMF 7) At about the  
 8 same time, defendant Quintero arrived at the location and joined Officers Skiver  
 9 and Huerta. (UMF 8) After finding that the lobby entrance doors were locked,  
 10 Officer Skiver gained entry to the apartment building by using his pocketknife to  
 11 open a nearby stairwell door. (UMF 9) Once inside, Officers Skiver and Quintero  
 12 went to the fourth floor while Officer Huerta remained in the lobby to prop open  
 13 the entrance door for other LAPD units and the Fire Department who he knew  
 14 were also responding. (UMF 10)

15  
 16  
 17 As Officers Skiver and Quintero made their way up the stairwell of the  
 18 apartment complex, Officer Quintero donned a pair of latex gloves so as to be  
 19 ready to render first aid to Martinez based upon the likelihood that he was  
 20 bleeding. (UMF 11) Each of the defendant officers were trying to reach Martinez  
 21 quickly to render medical aid until the paramedics arrived. (UMF 12) Officers  
 22 Huerta and Skiver had a Taser in their car but did not bring it up to the apartment  
 23 because they were concerned with getting to the location quickly to render aid.  
 24 (UMF 13) Officer Quintero did not have a Taser on April 21, 2015. (UMF 14)

25  
 26  
 27 Upon reaching the fourth floor, Officers Skiver and Quintero saw Ms.  
 28 Ramirez standing just outside of her apartment at the opposite end of the landing.

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1 (UMF 15) Ms. Ramirez waved the officers over and when they arrived she told  
 2 them that Martinez had cut himself with a knife because he was depressed but that  
 3 he was no longer armed as she had taken the knife away and placed it on the  
 4 kitchen counter. Ms. Ramirez directed the officers into her apartment. (UMF 16)  
 5 Less than a minute later, defendant Rivera and his partner, Officer Jack Tuck, as  
 6 well as Detective Steven Juarez arrived at the apartment building and met Officer  
 7 Huerta in the lobby of the apartment complex. The entire incident lasted about five  
 8 minutes after Officers Rivera and Tuck arrived. (UMF 17) Officers Rivera and  
 9 Tuck had a Taser in their car but did not bring it up to the apartment because they  
 10 were also concerned about getting there quickly to render aid. All four officers  
 11 took the elevator to the fourth floor of the complex to join Officers Skiver and  
 12 Quintero. (UMF 18)

15 Officers Skiver and Quintero were the first to enter Martinez's apartment.  
 16 They observed him seated in a wheelchair in the center of the living room,  
 17 approximately 17 feet from the entrance of the apartment. (UMF 19) Officer  
 18 Quintero observed that Martinez's shirt was covered in blood and he believed that  
 19 Martinez had sustained a significant injury. (UMF 20) As he approached  
 20 Martinez, Officer Skiver asked him what was wrong and where he was injured, but  
 21 Martinez did not respond. (UMF 21)

23 As Officer Skiver came within approximately five feet of Martinez,  
 24 Martinez used his feet to roll himself backward in his wheelchair until he reached a  
 25 sliding glass door on the north side of the living room. Officer Skiver again asked  
 26 Martinez what was wrong and how they could help him, but Martinez remained  
 27 silent. (UMF 22) Martinez then reached underneath his right thigh and pulled out  
 28

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1 an approximately eight and half inch fixed-blade knife that he had been concealing.  
2 (UMF 23) The knife Martinez had in the wheelchair was not the same knife that  
3 he had initially used to stab himself. (UMF 24) Martinez held the knife in his  
4 right hand with his arm fully extended in front of him and the blade pointing  
5 outward. Officer Skiver announced several times that Martinez had a knife while  
6 he began walking backward away from Martinez. (UMF 25) In response to seeing  
7 the knife, Officers Skiver and Quintero un-holstered their pistols but kept them at  
8 the low ready position. (UMF 26) Officers Tuck, Rivera, Huerta and Juarez  
9 arrived at the apartment just as Officer Skiver announced that Martinez had the  
10 knife. (UMF 27)

13 Out of concern for Ms. Ramirez's safety, she was escorted out of the  
14 apartment and into the hallway. She then went to the apartment of her neighbors in  
15 Unit 402. (UMF 28) Officer Skiver repeatedly ordered Martinez in English to  
16 drop the knife and put his hands up but Martinez neither complied nor responded.  
17 (UMF 29) Officer Quintero then gave similar commands in Spanish, but Martinez  
18 did not comply or respond. (UMF 30) Martinez slowly pushed himself out of his  
19 wheelchair to a standing position. Without saying a word, Martinez then began  
20 walking toward the officers with the knife clenched in his right hand. After taking  
21 about five to six steps, Martinez walked back and sat down again. (UMF 31)

24 Officer Skiver reiterated his command for Martinez to drop the knife and  
25 telling him that the officers were there to help, but Martinez neither complied nor  
26 responded. (UMF 32) Within a few moments, Martinez stood up again and began  
27 pacing in the living room. Officers Rivera and Huerta now stood on either side of  
28

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1 Officer Skiver near the threshold of the apartment and attempted to communicate  
 2 with Mr. Martinez in Spanish, but he did not respond. (UMF 33) Martinez was  
 3 told repeatedly to drop the knife, that the officers just wanted to help him and that  
 4 he did not want to do this. However, throughout the incident, Martinez never said a  
 5 word. (UMF 34)

7 While watching Martinez from the doorway, Officer Skiver asked Officer  
 8 Tuck to retrieve a Taser from his vehicle. Officer Tuck acknowledged the request  
 9 and left the scene to obtain a Taser. (UMF 35) At about the same time, Detective  
 10 Juarez broadcast a radio request for additional units on an emergency basis. (UMF  
 11 36) The shooting occurred about a minute later before Officer Tuck returned.  
 12 (UMF 37) Officer Skiver directed the other officers to step back out of the  
 13 threshold of the apartment to create more space between themselves and Martinez.  
 14 (UMF 38)

16 Martinez then stopped pacing in the living room and re-adjusted his hold on  
 17 the knife to an overhand grip. He placed the tip of the blade against his chest and  
 18 pushed it an inch or two into his body by hitting on the handle with his other hand.  
 19 (UMF 39) The officers continued to give Martinez commands to drop the knife in  
 20 English and Spanish and reassured him they were there to help, but Martinez  
 21 merely shook his head side to side as if indicating “no.” (UMF 40) Martinez then  
 22 pulled the knife out of his chest and began walking toward the officers with the  
 23 knife pointed toward the officers. (UMF 41) In response, the officers stepped  
 24 completely out of the apartment and into the exterior hallway. Officers Quintero,  
 25 Skiver and Huerta moved to the left of the entrance of the apartment while Officer  
 26 Rivera stepped straight back. (UMF 42) Officer Rivera walked straight backward

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1 rather than to the left with his fellow officers so as to maintain visual contact with  
 2 Martinez and to stay out of the other officers' potential line of fire. (UMF 43)

3 As Martinez approached the threshold of the apartment, he was still gripping  
 4 the knife in his right hand with his arm extended outward. Martinez appeared to be  
 5 focused on Officer Rivera and pointed the blade toward him as he walked in his  
 6 direction. (UMF 44) Officer Rivera ordered Martinez to stop and drop the knife  
 7 multiple times while he simultaneously kept stepping backward. (UMF 45)

8 Officer Rivera also told the other officers, who were no longer in a position to see  
 9 Martinez, that Martinez was about to exit the residence. (UMF 46) After moving  
 10 backward approximately 7 to 8 feet, Officer Rivera found himself in an alcove that  
 11 had a solid wall behind him and to his left and a metal railing to his right so that he  
 12 had no more ground to surrender to Martinez. (UMF 47)

13 As Martinez walked toward Officer Rivera at a fast pace, he leaned forward  
 14 and held the knife pointed outward toward Officer Rivera. (UMF 48) Officer  
 15 Rivera stated out loud that he did not want to have to shoot Martinez, but Martinez  
 16 kept advancing. (UMF 49) When Martinez was within approximately three to five  
 17 feet of Officer Rivera, Officer Rivera believed that Martinez was trying to stab or  
 18 kill him and fired one round. (UMF 50) Martinez fell to the floor but immediately  
 19 used his left arm to prop up his upper torso. Martinez looked up at Officer Rivera,  
 20 lunged forward with the knife in his right hand, and attempted to stab Officer  
 21 Rivera in the leg by swinging the knife in a side-to-side motion. (UMF 51) In  
 22 response, Officer Rivera fired a second round at Martinez's upper torso area.  
 23 (UMF 52)

24 Officer Huerta saw Martinez push himself up using his left arm and lunge  
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1 forward within one to two feet of Officer Rivera with the knife clenched in his  
2 hand. Believing that Martinez was trying to stab Officer Rivera, he fired one  
3 round at Martinez from a distance of approximately five feet. (UMF 53) Officer  
4 Quintero also saw Martinez fall to the ground after being shot by Officer Rivera,  
5 support himself with his left hand, and attempt to lunge toward Officer Rivera with  
6 the knife tightly clenched in his hand with the blade pointed toward Officer Rivera.  
7 In defense of Officer Rivera's life, Officer Quintero fired two rapid shots at  
8 Martinez from a distance of approximately four feet. (UMF 54)

9  
10 After the shots were fired, Martinez was lying face down with his right arm  
11 extended in front of him, still holding the knife. Officer Skiver used his right foot  
12 to kick the knife out of Martinez's right hand. (UMF 55) Martinez was then  
13 placed in handcuffs. (UMF 56)

14  
15 Firefighter/emergency medical personnel had arrived on the scene prior to  
16 the shooting and and evaluated Martinez within seconds of him being placed in  
17 handcuffs. (UMF 57) With the assistance of Officers Skiver and Huerta, the  
18 LAFD personnel placed Martinez on a gurney and immediately began performing  
19 cardiopulmonary resuscitation. Despite their efforts, LAFD personnel were unable  
20 to revive Martinez and he was pronounced dead at the scene. (UMF 58)

21  
22 In April of 2015, LAPD policy did not require that patrol officers be in  
23 possession of a Taser. (UMF 59) If a patrol officer checked out a Taser in April of  
24 2015, they were not required to carry the Taser on their person. (UMF 60) In  
25 April of 2015, LAPD policy authorized an officer to use of deadly force to protect  
26 himself/herself or others from what was reasonably believed to be an imminent  
27 threat of death or serious bodily injury. (UMF 61)

1 Plaintiff Molina does not represent the estate of the decedent and is not its  
 2 successor-in-interest. She has not filed an affidavit asserting standing for  
 3 maintaining an action for survival in the State of California. Moreover, she has  
 4 admitted in written discovery that she has no documents establishing that she is  
 5 representing the estate. (UMF 62) In contrast, the decedent was survived by a  
 6 wife and children, who did file an affidavit asserting their status as successors in  
 7 interest to the estate in an action in the Los Angeles Superior Court arising out of  
 8 this same incident. (UMF 63) Furthermore, Molina does not believe that the  
 9 decedent had a will. (UMF 64)

## 11 II. AUTHORITY FOR MOTION

12 Summary judgment is appropriate when it is demonstrated that there exists  
 13 no genuine issue as to any material fact, and that the moving party is entitled to  
 14 judgment as a matter of law. (FRCP 56(c); *Adickes v. S.H. Kress & Co.* (1970) 398  
 15 U.S. 144, 157; *Fortyune v. American Multi- Cinema, Inc.* (9<sup>th</sup> Cir. 2004) 364 F. 3d  
 16 1075, 1080). “[W]here the nonmoving party will bear the burden of proof at trial  
 17 on a dispositive issue, a summary judgment motion may properly be made in  
 18 reliance solely on the ‘pleadings, depositions, answers to interrogatories, and  
 19 admissions on file.’” (*Celotex Corp v. Catrett* (1986) 477 U.S. 317, 323).

22 Summary judgment should be entered against a party who fails to make a showing  
 23 sufficient to establish the existence of an element essential to that party’s case, and  
 24 on which that party will bear the burden of proof at trial. (*Id.* at 322). “[A]  
 25 complete failure of proof concerning an essential element of the nonmoving party’s  
 26 case necessarily renders all other facts immaterial.” (*Id.*) The moving party has no  
 27 burden to negate or disprove matters on which the non-moving party has the  
 28

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1 burden of proof at trial, but need only point out to the Court through argument an  
 2 absence of evidence to support the non-moving party's case. (*Devereaux v. Abbey*  
 3 (9th Cir. 2001) 263 F.3d 1070, 1076).

4 The opposing party may not rely upon the mere allegations or denials of its  
 5 pleadings, but is required to tender evidence of specific facts in the form of  
 6 affidavits and/or admissible discovery material, in support of its contention that the  
 7 dispute exists. (*FRCP* 56 (c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*  
 8 (1986) 475 U.S. 574, 586). The "purpose of summary judgment is to 'pierce the  
 9 pleadings and to assess the proof in order to see whether there is a genuine need for  
 10 trial.'" (*Id.* at 587). To demonstrate a genuine issue, the opposing party "must do  
 11 more than simply show that there is a mere metaphysical doubt as to the material  
 12 facts...Where the record taken as a whole could not lead a rational trier of fact to  
 13 find for the nonmoving party there is no 'genuine issue for trial.'" (*Id.*; *Scott v.*  
 14 *Harris* (2007) 550 U.S. 372, 380). Conclusory allegations unsupported by factual  
 15 data will not create a triable issue of fact allowing a party to survive a summary  
 16 judgment motion. (*Marks v. U.S.* (9th Cir. 1978) 578 F.2d 261, 263; *FTC v.*  
 17 *Publ'g Clearing House, Inc.* (9th Cir. 1996) 104 F.3d 1168, 117).

18 As set forth more fully below, there are no triable issues of material fact  
 19 which could defeat this motion. The facts demonstrate that plaintiffs cannot prove  
 20 the requisite elements of any of their claims against defendants. While it is  
 21 anticipated that plaintiffs will attempt to make factual allegations, any alleged  
 22 "facts" are based on unsupported speculation, making them immaterial. Therefore,  
 23 defendants are entitled to summary judgment or partial summary judgment as there  
 24 are no *facts* to support plaintiffs' allegations.  
 25  
 26  
 27  
 28



1 **III. PLAINTIFFS' CLAIM OF EXCESSIVE FORCE/UNREASONABLE**  
 2 **SEIZURE FAILS**

3 To establish a claim of excessive force under the Fourth Amendment,  
 4 plaintiffs must show that defendants used an amount of force that was objectively  
 5 unreasonable under the totality of the circumstances from the perspective of a  
 6 reasonable officer at the scene. (*Graham v. Connor* (1989) 490 U.S. 386, 397).  
 7 Determining whether the force used is reasonable under the Fourth Amendment  
 8 “requires a careful balancing of the nature and quality of the intrusion on the  
 9 individual’s Fourth Amendment interests against the countervailing governmental  
 10 interests at stake.” (*Id.* at 396). This balancing test entails consideration of the  
 11 totality of the facts and circumstances in the particular case, including “the severity  
 12 of the crime at issue, whether the suspect poses an immediate threat to the safety of  
 13 the officers or others, and whether he is actively resisting arrest or attempting to  
 14 evade arrest by flight.” (*Id.*).

15 Moreover, the reasonableness of a particular use of force must be judged  
 16 from the perspective of a reasonable officer on the scene, rather than with the  
 17 20/20 vision of hindsight. (*Jackson v. City of Bremerton* (9th Cir. 2001) 268 F.3d  
 18 646). The consideration of reasonableness must “embody allowance for the fact  
 19 that police officers are often forced to make split-second judgments – in  
 20 circumstances that are tense, uncertain, and rapidly evolving – about the amount of  
 21 force that is necessary in a particular situation.” (*Id.*) “Not every push or shove,  
 22 even if it may later seem unnecessary in the peace of a judge’s chambers’ violates  
 23 the Fourth Amendment.” (*Id.*) Police “are not required to use the least intrusive  
 24 degree of force possible,” but the inquiry is whether the force that was used to  
 25  
 26  
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 28

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1 effect a particular seizure was reasonable, viewing the facts from the perspective of  
 2 a reasonable officer on the scene. (*Forrester v. City of San Diego* (9th Cir. 1994)  
 3 25 F.3d 804, 808). During a lawful encounter, officers are “authorized to take such  
 4 steps as [are] reasonably necessary to protect their personal safety and to maintain  
 5 the status quo...” (*U.S. v. \$109,179* (9th Cir. 2000) 228 F.3d 1080, 1084).  
 6

7 Further, even if the Fourth Amendment rights of Martinez were violated,  
 8 those rights were personal to him and plaintiffs lack standing to raise that issue.  
 9 (*Alderman v. U.S.* (1969) 394 U.S. 165; *Smith v. City of Fontana* (9th Cir. 1987)  
 10 818 F.2d 1411). Here, as explained below, the defendant officers were in  
 11 justifiable fear for the life of defendant Rivera based upon the actions of Martinez.  
 12

13 a. Martinez Posed an Immediate and Deadly Threat to Officer Rivera

14 An officer may reasonably use deadly force when he confronts a suspect in  
 15 close proximity whose actions indicate intent to attack; in those circumstances, the  
 16 court cannot ask officers to hold fire in order to ascertain whether the suspect will,  
 17 in fact, injure or murder the officer. (*Martinez v. County of Los Angeles* (1996) 47  
 18 Cal. App.4th 334).  
 19

20 For example, in *Blanford v. Sacramento County* (9<sup>th</sup> Cir. 2005) 406 F.3d  
 21 1110, 2005 U.S. App. LEXIS 7893, two sheriff’s deputies responded to a report  
 22 that a man wearing a ski mask and carrying a sword was walking through a  
 23 residential neighborhood and behaving erratically. The deputies located Blanford,  
 24 who was walking in the opposite direction carrying a 2 ½ foot long saber by the  
 25 handle and wearing a ski mask pulled back from his face. The deputies got out of  
 26 their vehicle, drew their guns, and one of them called out, ““Sheriff’s department,  
 27 stop, drop the sword.”” (*Ibid*). Blanford kept walking and did not notice the  
 28

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1 deputies because unbeknownst to the deputies, he was wearing headphones and  
 2 listening to music at a high volume. (*Ibid*). The deputies followed Blanford at a  
 3 distance of approximately 20 to 25 feet with their guns aimed at him, continuing to  
 4 shout commands to drop the sword and warning that they would shoot. (*Id.* at  
 5 1112-13). Blanford continued walking up to the front door of a private home,  
 6 searched his pockets and knocked on the door. No one answered, and Blanford  
 7 walked around the side of the house toward where there was a gate to the back  
 8 yard. The deputies again commanded Blanford to drop the sword, but he did not.  
 9 Both deputies fired their guns at Blanford as he rounded a corner to the gate  
 10 because they were concerned that he posed a danger to anyone in the yard or  
 11 house. At least one shot struck Blanford, but he continued and went through the  
 12 gate, closing it behind him. One of the deputies opened the gate and saw Blanford  
 13 trying to open a door to the garage which led to the house. The deputy ordered  
 14 Blanford again to drop the sword, but Blanford continued to try to open the door.  
 15 The deputy fired at Blanford again, hitting his wrist, because he was concerned that  
 16 Blanford might get into the residence and hurt or kill someone inside.  
 17 (*Ibid*). Blanford turned and walked toward the back yard, still holding the sword,  
 18 and the deputy continued firing, severing Blanford's spine and rendering him a  
 19 paraplegic. It was later discovered that the house was Blanford's parents' house.  
 20 Only about fourteen seconds passed between the first and last shots, and the entire  
 21 encounter took approximately two minutes. (*Id.* at 1113-14).  
 22  
 23  
 24  
 25

26 Blanford filed a civil suit against the deputies, the County, the Sheriff's  
 27 Department and the Sheriff, alleging, inter alia, excessive force and false arrest  
 28 under 42 U.S.C. § 1983, *Monell* liability, assault and battery and negligence.

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1 (*Blanford, supra*, 406 F.3d at 1114). The District Court granted summary  
 2 judgment in favor of the defendants, finding that “[the deputies] acted in an  
 3 objectively reasonable manner in firing each volley, because a reasonable officer in  
 4 their position at the time would have believed that Blanford presented an imminent  
 5 threat of death or serious bodily injury to persons inside the house or yard of [the  
 6 residence], or to themselves.” (*Ibid*). The Ninth Circuit ruled that “The deputies’  
 7 decision to fire was based upon Blanford’s refusal to heed warnings and  
 8 commands to drop the sword, as well as his attempt to enter a private residence and  
 9 backyard with a lethal weapon. These facts, objectively, and reasonably, led the  
 10 deputies to conclude that the situation could not be resolved by talking, and that  
 11 Blanford posed an immediate and unacceptable risk of harming whoever was in the  
 12 house or yard should he be allowed to escape beyond the gate.” (*Id.* at 1116).

13 Similarly, in *Cosentino v. Kurtz*, 2013 U.S. Dist. LEXIS 69218 (C.D. Cal.  
 14 2013), Downey police officers were granted summary judgment in a Fourth  
 15 Amendment Section 1983 case when they shot and killed a man who was carrying  
 16 an axe in the middle of the street and who ignored orders to drop the axe and  
 17 moved toward the police officers’ vehicle. (*Id.* at \*3-6). Despite a dispute over  
 18 whether the suspect raised the axe and despite the fact that there was no evidence  
 19 the suspect committed a violent crime, the court found the use of deadly force  
 20 objectively reasonable under the Fourth Amendment. (*Id.* at \*19-20).

21 Here, the defendant officers justifiably feared for the life of Officer Rivera  
 22 for the following reasons:

- 23 1. Despite the officers repeated commands and pleas, Martinez refused to
- 24 drop his knife;

1 2. Martinez followed the officers out of the entrance of the apartment and  
2 advanced on them while displaying the eight and one half inch knife in a  
threatening manner;

3 3. Martinez focused his attention on Officer Rivera, pointed the knife at  
4 him, ignored Officer Rivera's commands to stop, and advanced to within  
5 three to five feet of Officer Rivera while threatening him with the knife; and

6 4. After Martinez fell to the ground, he immediately began slashing at  
7 Officer Rivera's legs, which reasonably could have been thought to have  
8 imminently caused death or a serious life-threatening injury.

9 Therefore, the defendant officers reasonably believed that Martinez's actions  
10 posed an immediate and deadly threat to Officer Rivera's life which justified their  
11 use of deadly force.

12 b. No Specific Warning Required Before Using Deadly Force

13 Defendants anticipate that plaintiffs will argue that defendants should have  
14 given an explicit warning, such as, "drop the knife or I'll shoot," and in the  
15 absence of such an explicit warning, the officers' use of deadly force was  
16 objectively unreasonable. However, as explained below, no such explicit "if/then"  
17 warning is required. Instead, for the use of force to be reasonable, a police officer  
18 needs only to give appropriate instructions on how to comply before force is used  
19 "if feasible."  
20

21 The *Graham* factors for evaluating the propriety of a use of force are not  
22 exclusive; instead, the Court must "examine the totality of the circumstances and  
23 consider whatever specific factors may be appropriate in a particular case, whether  
24 or not listed in *Graham*." (*Glenn v. Washington City* (9th Cir. 2011) 673 F.3d 864,  
25 872). One such additional factor is whether or not a warning was given before  
26 force was used. (*Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 882 ("[W]e  
27  
28

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1 have held that ‘the giving of a warning or the failure to do so is a factor to be  
 2 considered in applying the *Graham* balancing test.’” (quoting *Deorle v. Rutherford*  
 3 (9th Cir. 2001) 272 F.3d 1272, 1284)). In general, the Ninth Circuit has  
 4 recognized that an officer must give a warning before using deadly force  
 5 “whenever practicable.” (*Harris v. Roderick* (9th Cir. 1997) 126 F.3d 1189, 1201  
 6 (citing *Tennessee v. Garner* (1985) 471 U.S. 1, 11-12)).

8 In *Deorle*, the Ninth Circuit held that the absence of *either* a warning or an  
 9 order to halt was a factor in its application of the *Graham* balancing test. (*Deorle*,  
 10 *supra*, 272 F.3d at 1283-84); *cf. Forrester v. City of San Diego* (9th Cir. 1994) 25  
 11 F.3d 804 (holding that use of force was not unreasonable, in part because protesters  
 12 were given warning and instructions on how to comply before force was applied)).

14 Here, the officers gave multiple audible commands in both English and  
 15 Spanish to Martinez from a close distance prior to the use of deadly force. The  
 16 officers repeatedly implored Martinez to “drop the knife,” which provided him  
 17 with a simple and clear instruction on how to comply with their commands to  
 18 avoid the application of lethal force. Martinez actually acknowledged the officers’  
 19 entreaties to drop the knife by shaking his head side to side. Further, immediately  
 20 prior to the shooting, defendant Rivera shouted to his fellow officers, “I don’t want  
 21 to shoot him” as Martinez ignored defendant Rivera’s commands to stop  
 22 advancing. The officers’ instructions combined with the fact that each of the  
 23 officers had their pistols drawn during much of the approximately five minute  
 24 encounter served as a clear warning that deadly force would be used unless  
 25 Martinez dropped his knife.

26 As judged from the perspective of a reasonable officer on the scene,  
 27  
 28

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1 Martinez had obviously heard the officers' repeated commands as evidenced by his  
 2 indication that would not comply by shaking his head "no." Despite the obvious  
 3 warning that the officers would use deadly force if their commands were not  
 4 obeyed, Martinez's actions demonstrated to a reasonable officer his intent to ignore  
 5 the commands and instead to use deadly violence, first against himself and then  
 6 against Officer Rivera.

8 These facts are entirely distinguishable from *Deorle* which involved an  
 9 officer's use of a beanbag gun to subdue a person who "was unarmed, had not  
 10 attacked or even touched anyone, had generally obeyed the instructions given him  
 11 by various police officers, and had not committed any serious offense." (*Deorle*,  
 12 *supra*, 272 F.3d at 1281). Unlike *Deorle*, Martinez was dangerous, recalcitrant,  
 13 and threatening. (*See City and County of San Francisco, Calif. v. Sheehan* (2015)  
 14 135 S. Ct. 1765, 1776). Therefore, the officers gave Martinez more than sufficient  
 15 warnings and instructions on how to comply to avoid the use of deadly force, and  
 16 the fact that those warnings and instructions went unheeded is an objective factor  
 17 justifying defendants' use of force.

19  
 20 c. No Liability for Alleged Tactical Errors Prior to the Use of Deadly  
 21 Force

22 Plaintiffs will also likely argue that the officers should have used a Taser,  
 23 pepper spray, a beanbag shotgun or other less-lethal force to take custody of  
 24 Martinez, and that failure gives rise to a Fourth Amendment claim. However, the  
 25 Ninth Circuit has rejected this notion when the use of deadly force was otherwise  
 26 reasonable:

27 "Requiring officers to find and choose the least intrusive  
 28



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1 alternative would require them to exercise superhuman judgment. In  
2 the heat of battle with lives potentially in the balance, an officer  
3 would not be able to rely on training and common sense to decide  
4 what would best accomplish his mission. Instead, he would need to  
5 ascertain the *least* intrusive alternative (an inherently subjective  
6 determination) and choose that option and that option only. Imposing  
7 such a requirement would inevitably induce tentativeness by officers,  
8 and thus deter police from protecting the public and themselves. It  
9 would also entangle the courts in endless second-guessing of police  
10 decisions made under stress and subject to the exigencies of the  
11 moment. Officers thus need not avail themselves of the least intrusive  
12 means of responding to an exigent situation; they need only act within  
13 that range of conduct we identify as reasonable.”

14 (*Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1992) (italics in original); see also,  
15 *Plakas v. Drinski*, 19 F.3d 1143, 1148-49 (7th Cir. 1993) (“... where deadly force is  
16 otherwise justified under the Constitution, there is no constitutional duty to use  
17 non-deadly alternatives first.”).

18 Moreover, even when pre-shooting tactics contribute to the ultimate need to  
19 use deadly force, such tactics are not themselves actionable unless they constitute  
20 an independent constitutional violation. (*Billington v. Smith* (9<sup>th</sup> Cir. 2002) 292  
21 F.3d 1177, 1189-90). Because the failure to bring less lethal equipment to a crime  
22 scene is not an independent Fourth Amendment violation, it is not actionable under  
23 *Billington*. (See, *David v. City of Fremont*, 2006 U.S. Dist. LEXIS 57211 at \*28-  
24 34 (N.D. Cal. 2006) (tactics of officer responding to suicidal man with a knife who  
25 did not wait for less lethal options to arrive before confronting and ultimately  
26 shooting the man in self defense were not independent constitutional violations).  
27  
28



#### IV. PLAINTIFFS LACK STANDING ON THE FOURTH AMENDMENT CLAIM

In the First Claim for Relief, Plaintiffs assert a wrongful death action under the Fourth Amendment for unlawful seizure of the decedent. However, Fourth Amendment rights may not be vicariously asserted; they are personal to the decedent. (*Smith v. City of Fontana* (9<sup>th</sup> Cir. 1987) 818 F.2d 1411, 1417). Therefore, although the executor may maintain a survival action, Plaintiff Molina cannot assert a claim individually because there is no allegation that she was personally subjected to an unlawful seizure or use of force. (*Ibid*).

“In § 1983 actions, . . . the survivors of an individual killed as a result of an officer’s excessive use of force may assert a Fourth Amendment claim on that individual’s behalf if the relevant state’s law authorizes a survival action. The party seeking to bring a survival action bears the burden of demonstrating that a particular state’s law authorizes a survival action and that the plaintiff meets that state’s requirements for bringing a survival action.” (*Hayes v. County of San Diego* (9<sup>th</sup> Cir. 2013) 736 F.3d 1223, 1228, *quoting* *Moreland v. Las Vegas Metro. Police Dep’t.* (9<sup>th</sup> Cir. 1998) 159 F.3d 365, 369 (internal citation omitted).

“California’s statutory requirements for standing to bring a survival action are stated under *Code of Civil Procedure* § 377.30: ‘A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent’s successor in interest . . . , and an action may be commenced by the decedent’s personal representative or, if none, by the decedent’s successor in interest.’ (*Tatum v. City & Cnty. of San Francisco* (9<sup>th</sup> Cir. 2006) 441 F.3d 1090, 1093 n.2) (“Where there is no personal representative for the estate, the decedent’s

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1 ‘successor in interest’ may prosecute the survival action if the person purporting to  
 2 act as successor in interest satisfies the requirements of California law . . . .”)  
 3 (citing *Cal. Civ. Proc. Code* §§ 377.30, 377.32), *see also*, *Hayes v. County of San*  
 4 *Diego, supra*, 736 F. 3d at 1228).

5  
 6 Here, despite the pleadings, Plaintiff Molina does not represent the estate of  
 7 the decedent and is not its successor in interest. She has not filed an affidavit  
 8 asserting standing for maintaining an action for survival in the State of California.  
 9 (See, *Cal. Civ. Proc. Code* § 377.32). Moreover, she has admitted in written  
 10 discovery that she has no documents establishing that she is representing the estate.  
 11 In contrast, the decedent was survived by a wife and children, who did file an  
 12 affidavit asserting their status as successors in interest to the estate in an action in  
 13 the Los Angeles Superior Court for the same incident. Furthermore, neither  
 14 Plaintiff nor his wife believes the decedent had a will. Therefore, there is no  
 15 evidence Plaintiffs have a right to recover on behalf of the decedent for his  
 16 personal cause of action and the Fourth Amendment claim must be dismissed.

## 17 18 19 **V. PLAINTIFFS’ CLAIM OF INTERFERENCE WITH FAMILIAL** 20 **INTEGRITY FAILS**

21 In *Kelson v. City of Springfield* (9th Cir.1985) 767 F.2d 651, the Ninth  
 22 Circuit held that the state’s interference with parents’ liberty interest in the  
 23 companionship and society of their children without due process of law is  
 24 cognizable under 42 U.S.C. § 1983. (*Id.* at 654). “[S]ubstantive due process  
 25 claim[s] may be asserted by both the parents and children of a person killed by law  
 26 enforcement officers.” (*Moreland v. Las Vegas Metro. Police Dep’t* (9th Cir. 1998)  
 27 159 F.3d 365, 371).  
 28

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However, substantive due process violations under the Fourteenth Amendment occur only when official conduct “shocks the conscience.” (*Gantt v. City of L.A.* (9th Cir. 2013) 717 F.3d 702, 707 (citing *Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 554)). Under the overarching test of whether the official’s conduct “shocks the conscience” are two standards: the more demanding “purpose to harm” standard and the lesser “deliberate indifference” standard. (*Porter v. Osborn* (9th Cir. 2008) 546 F.3d 1131, 1137 (applying purpose to harm standard when police officer killed suspect during quickly escalating investigation of suspicious vehicle)). To determine which of the two standards govern, courts look at the context of the events leading to the deprivation. (*Id.*) The critical consideration is whether the circumstances are such that actual deliberation by the officer is practical. (*Hayes v. Cnty. of San Diego* (9th Cir. 2013) 736 F.3d 1223, 1230). “Where actual deliberation is practical, then an officer’s ‘deliberate indifference’ may suffice to shock the conscience. On the other hand, where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives.” (*Wilkinson*, 610 F.3d at 554 (citing *Porter*, 546 F.3d at 1137)).

When the alleged violation arises out of “fast paced circumstances presenting competing public safety obligations,” the purpose to harm standard applies. (*Porter*, 546 F.3d at 1139). Due to the unforeseen circumstances demanding an officer’s instant judgment, “even precipitate recklessness fails to inch close enough to harmful purpose” to shock the conscience. (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 853 (finding no substantive due process

1 violation when patrol car rammed and killed 16-year-old suspected offender  
 2 following high-speed chase). Because the purpose to harm standard is a subjective  
 3 standard of culpability, an officer violates due process if he uses force with “only  
 4 an illegitimate purpose in mind,” such as bullying a suspect or getting even. (*A.D.*  
 5 *v. Calif. Hwy. Patrol* (2013) 712 F.3d 446, 453).  
 6

7 Here, the officers were confronted with a quickly-evolving scenario that  
 8 demanded instant judgments such that the purpose to harm standard applies. As  
 9 there is undisputedly no evidence from which to infer that the defendant officers  
 10 acted with any illegitimate purpose in mind or ulterior motive, plaintiffs’ second  
 11 cause of action fails.  
 12

## 13 **VI. PLAINTIFFS’ CLAIM OF MUNICIPAL LIABILITY FOR** 14 **UNCONSTITUTIONAL CUSTOMS AND PRACTICES FAILS**

15 It is well-established that a local governmental entity such as the City cannot  
 16 be liable for damages pursuant to 42 U.S.C. §1983 based solely upon a theory of  
 17 *respondeat superior*. (*Monell v. Dept. of Soc. Serv.* (1978) 436 U.S. 658). Instead,  
 18 plaintiffs have the burden of proving that the underlying civil rights violation  
 19 existed *and* was caused by a permanent and well-settled official policy or custom  
 20 of the public entity. (*City of St. Louis v. Praprotnik* (1988) 485 U.S. 112). A  
 21 municipality can be liable under Section 1983 only where its policies are the  
 22 moving force behind the constitutional violation. (*City of Canton v. Harris* (1989)  
 23 489 U.S. 378, 389; *Blair v. City of Pomona* (9th Cir. 2000) 223 F.3d 1074). There  
 24 must be an affirmative link between the policy and the particular violation alleged.  
 25 (*Oklahoma v. Tuttle* (1995) 471 U.S. 808, 823).  
 26  
 27

28 To establish *Monell* liability for a failure to train or adequately supervise

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1 subordinates, the evidence must show a pattern of inadequate training which  
 2 amounts to the deliberate indifference to rights of persons with whom the  
 3 inadequately trained employees come into contact. (*City of Canton, supra; Davis v.*  
 4 *City of Ellenburg* (9th Cir. 1989) 869 F.2d 1239). Moreover, there is no liability  
 5 pursuant to Section 1983 for negligence and such liability must be predicated upon  
 6 a deliberate deprivation of constitutional rights by defendant. Neither negligent  
 7 training of an employee nor a sound program occasionally administered  
 8 negligently constitutes deliberate indifference. (*City of Canton, supra*, at 391).  
 9

10 Finally, even if there was a violation of plaintiffs' rights, a single isolated  
 11 incident does not establish official policy sufficient to render the municipality  
 12 liable under Section 1983. (*Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 918;  
 13 *Adell v. Las Vegas Metro Pol. Dept.* (9th Cir. 2001) 268 F.3d 924). Proof of  
 14 random acts or isolated incidents of unconstitutional action by a non-policymaking  
 15 employee are insufficient to establish the existence of a municipal policy or  
 16 custom. (*McDade v. West* (9th Cir. 2000) 223 F.3d 1135, 1141).  
 17

18 Here, plaintiffs offer only conclusory allegations but no facts establishing  
 19 either 1) an underlying constitutional violation, or 2) that any such violation  
 20 occurred as a result of a permanent and well-settled official policy or custom of the  
 21 City. Moreover, even if plaintiffs' rights were violated, plaintiffs have offered no  
 22 evidence establishing that such a violation was anything other than a random,  
 23 isolated event. As such, this claim fails and should be dismissed as to the City.  
 24

25 Plaintiffs will argue that failure at the time of the incident to require all  
 26 officers to carry Tasers on their persons at all times was an unconstitutional policy.  
 27 However, no case has ever so held, and courts have found to the contrary. In  
 28

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1 *Plakas, supra*, 19 F.3d at 1148-49, the Court held that there was “not a single  
 2 precedent which holds that a governmental unit has a constitutional duty to supply  
 3 particular forms of equipment to police officers.” More recently, in *Castro v. City*  
 4 *of Mendota*, 2012 U.S. Dist. LEXIS 138699, \*33-34 (E.D. Cal. 2012), the Court  
 5 granted summary judgment on a *Monell* claim based on failure to equip deputies  
 6 with Tasers, noting the lack of authority for such a proposition and that the officers  
 7 had other options available that consisted of pepper spray, batons, physical force,  
 8 and a beanbag shotgun (which they carried *inside their car*). In light of the  
 9 foregoing, it cannot be said that the City was deliberately indifferent for not  
 10 imposing an absolute requirement that officers carry Tasers on their persons at all  
 11 times on the date of the incident.

12 Nor can Plaintiffs establish that the lack of such a policy caused Martinez to  
 13 be shot. It is speculative as to whether the officers would have felt that a Taser  
 14 was safe to use under the circumstances presented or if a Taser would have been  
 15 effective. This lack of a causal connection also is fatal to Plaintiffs’ *Monell* claim.

## 16 **VII. THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO** 17 **QUALIFIED IMMUNITY**

18 The individual Defendants are entitled to qualified immunity pursuant to the  
 19 “good faith exception.” “Government officials performing discretionary functions  
 20 generally are shielded from liability for civil damages insofar as their conduct does  
 21 not violate clearly established statutory or constitutional rights of which a  
 22 reasonable person would have known.” (*Harlow v. Fitzgerald* (1982) 457 U.S.  
 23 800, 818). If the law governing the conduct was clearly established, the court then  
 24 looks to whether, under that law, a reasonable officer could have believed the

1 conduct was lawful. (*Harlow, supra*, at 818; *Act Up!/Portland v. Bagley* (9th Cir.  
2 1993) 988 F.2d 868, 871).

3 So long as “a reasonable officer could have believed that his conduct was  
4 justified,” a plaintiff cannot “avoi[d] summary judgment by simply producing an  
5 expert’s report that an officer’s conduct leading up to a deadly confrontation was  
6 imprudent, inappropriate, or even reckless.” (*Billington v. Smith* (9th Cir. 2002)  
7 292 F.3d 1177, 1189; *Saucier v. Katz, supra*, 533 U.S. at 216, n. 6 (“[I]n close  
8 cases, a jury does not automatically get to second-guess these life and death  
9 decisions, even though a plaintiff has an expert and a plausible claim that the  
10 situation could better have been handled differently”)(quoting *Roy v. Inhabitants of*  
11 *Lewiston* (First Cir. 1994) 42 F.3d 691, 695)).

12  
13  
14 In the recent case of *City and County of San Francisco, Calif. v. Sheehan*  
15 (2015) 135 S. Ct. 1765, the Supreme Court considered the issue of qualified  
16 immunity in a factual scenario similar to the one presented here. In that case, the  
17 Supreme Court held that the officers were entitled to qualified immunity, in part,  
18 because under Ninth Circuit law “Sheehan cannot ‘establish a Fourth Amendment  
19 violation based merely on bad tactics that result in a deadly confrontation that  
20 could have been avoided.’” (*Id.* at 1777 (citing *Billington, supra*, 292 F.3d 1177 at  
21 1190)). Similarly, plaintiffs cannot establish a Fourth Amendment violation here  
22 based merely upon an allegation of bad tactics. Defendants could not have known  
23 that the failure to first use a Taser before using deadly force when confronted by a  
24 suspect with a knife would violate plaintiffs’ constitutional rights. Without “fair  
25 notice,” an officer is entitled to qualified immunity. (*See, Plumhoff v. Rickard*  
26 (2014) 134 S.Ct. 2012, 2023).



1           Considering the specific deadly situation confronting these defendant  
 2 officers as discussed above, they had sufficient reason to believe that their conduct  
 3 was justified. As defendants' actions were in no way contrary to existing law, they  
 4 are therefore entitled to qualified immunity.  
 5

### 6 **VIII. CONCLUSION**

7           Defendants respectfully request that the court grant their motion for  
 8 summary judgment in its entirety. Based on the undisputed facts of this case,  
 9 plaintiffs' claims have no merit against any of these named defendants. Therefore,  
 10 defendants are entitled to summary judgment on all claims and all causes of action  
 11 set forth in plaintiffs' FAC. In the alternative, defendants request partial summary  
 12 judgment as to each cause of action.  
 13

14  
 15 DATED: January 13, 2017           COLLINSON LAW, A Professional Corporation

16 By: \_\_\_\_\_/s/\_\_\_\_\_

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